To Be Argued By:
JOHN W. SCHRYBER

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ESTEE LAUDER INC.,

Plaintiff-Appellant,

—against—

ONEBEACON INSURANCE GROUP, LLC (successor in interest to CGU INSURANCE, f/k/a EMPLOYERS GROUP OF INSURANCE COMPANIES, EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA and COMMERCIAL UNION INSURANCE COMPANY), ONEBEACON INSURANCE COMPANY and ONEBEACON AMERICA INSURANCE COMPANY,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This appeal arises out of the IAS court's disregard of New York law concerning (i) waiver of an insurer's "untimely notice" defense, and (ii) the trigger of an insured's "timely notice" obligations.

First, the IAS court failed to apply the law holding that the *insurer* has a duty to provide timely and complete notice *to the insured* of all known coverage-forfeiture defenses (such as any "untimely notice" defense), and that a breach of this duty results in "constructive waiver" of the undisclosed defense. Yet, the IAS court granted summary judgment to Defendants-Respondents OneBeacon Insurance Company of America and affiliates ("OB") dismissing the complaint brought by Plaintiff-Appellant Estee Lauder Inc. ("EL") on the basis that EL gave "untimely notice" *notwithstanding* the undisputed fact that for nearly six years, between mid-2000 and mid-2006, OB selectively withheld disclosure of the "untimely notice" "defense" first unveiled in OB's summary judgment motion. During that period, OB selectively enumerated *other* grounds for disclaiming coverage, first in disclaimer letters issued in 2002 and then in its Answer herein in 2005.

Notwithstanding prior rulings by this Court that to avert waiver of a known "untimely notice" defense the insurer "*must*" make a non-selective and very specific disclosure of that defense in its pre-suit disclaimer, the IAS court held that

OB could avert a waiver *without* making such disclosure. The IAS court held that OB could (and did) unilaterally "except" itself from this disclosure duty by including a garden-variety clause in its pre-suit disclaimer that it was "reserving," for a later date, the non-selective disclosure that this Court held the insurer "must" make in that initial disclaimer. The IAS court justified its bold ruling on its speculation that this Court's precedent was based on a disclaimer letter that did not contain a reservations clause. In fact, it is undisputed that the disclaimer letter upon which this Court's precedential ruling was based *did* contain a reservations clause substantively identical to that contained in OB's disclaiming correspondence.

As for OB's failure to plead in its Answer that EL actually violated some "timely notice" condition, the IAS court simply added and subtracted words to OB's pleading to manufacture such an allegation. However, even as re-written by the IAS court, the Answer fails to allege any untimely notice defense with the "high degree of specificity" required to avert waiver.

Second, although the IAS court acknowledged the rule of law that a delay in asserting a known untimely notice defense of "more than three years" is a breach so egregious as to effect a waiver as a matter of law, the IAS court held that by including the aforementioned reservations clause in its 2002 disclaimer correspondence, OB "reserved" a "right" to wait *more than five years* – after this

litigation was commenced – to disclose such defense. However, because there is no "right" to delay disclosure of a known coverage-forfeiture defense for multiple years or until after the insurer's Answer is filed, such a delay cannot be something an insurer can "reserve rights" to do.

Third, the IAS court disregarded the law governing the applicable notice "trigger." With respect to the first of the two occurrences of property damage (at the "Huntington" property), the IAS court held that a "notice of potential claim" dispatched by EL in 1987 was *too early* to be deemed notice that the "State might bring suit" on account of that damage because, at that time, EL "had not been contacted by" the State. However, there is no requirement that the potential plaintiff "contact" the insured before the insured's potential for liability to the potential plaintiff becomes apparent. Indeed, upon receipt of EL's 1987 notice, OB acknowledged that such notice advised of EL's "potential liability" to the State.

The court's notion that EL's "Huntington" notice was too early not only flies in the face of well-established precedent, but it is internally inconsistent with the IAS court's ruling on the second of the two occurrences – the property damage at "Blydenburgh." As to that occurrence, the IAS court reversed course and held that EL should have issued notice of a potential claim *irrespective* of the prior contact between the State and EL. In those communications, the State communicated to

EL that the facts did not even warrant naming EL a "PRP" and, *a fortiori*, that there was no likelihood that the State would file suit against EL (much less a suit alleging policy-period property damage).

Fourth, because the material facts are not the subject of any genuine dispute, the IAS court committed reversible error not only in granting OB's summary judgment motion, but also did so in denying EL's own motion for partial summary judgment, which sought (i) dismissal of OB's supposed "untimely notice defense," and (ii) a declaration that OB owed and breached a duty to defend EL, based on the policy's duty-to-defend terms (as established by secondary evidence *in lieu* of the policy itself, which is missing).

ISSUES PRESENTED FOR REVIEW

1. Whether it was reversible error for the IAS court to grant OB summary judgment on an "untimely notice" "defense" (and to deny EL summary judgment dismissing that same "defense") when it is undisputed that (i) OB selectively concealed that alleged defense for nearly *six* years, during which time OB issued pre-suit disclaimer correspondence and an Answer that enumerated a different defense; (ii) as to the "Huntington landfill," EL issued a "notice of potential claim" in *1987* and, (iii) as to the "Blydenburgh landfill," the State's position prior to 1999 was that (a) there was no basis, at that time, for naming EL a

PRP (relative to any time period), and (b) the State was not even investigating disposals during the ELAC policy period?

2. Whether it was reversible error for the IAS court to fail to grant EL's motion for partial summary judgment declaring that EL had met its burden of establishing all material duty-to-defend terms of the lost policy at issue via undisputed secondary evidence and, thus, that OB owed and breached a duty to defend as a matter of law?

STATEMENT OF FACTS

For purposes of EL's appeal from the IAS court's grant of summary judgment in favor of OB, EL enumerates herein those facts which OB (i) did not dispute below, and/or (ii) did dispute, but as to which EL submitted supporting evidence.

A. The Policy

The policy at issue is policy no. E-164-003627, issued by one of OB's predecessors, "ELAC," in September 1968 (the "ELAC policy"). The ELAC policy named EL as an insured, and imposed a duty to defend EL with respect to claims seeking payment from EL for property damage alleged to have occurred during the policy period, which ran from September 19, 1968 to September 19, 1971. (R.450-451, ¶¶19-20). All of the aforementioned material terms of the

ELAC policy are established by secondary evidence, as this 39-year-old policy cannot be located by either party.

OB allegedly undertook a search for the policy between mid-2001 and mid-2002. (R.155, ¶10). EL also conducted an admittedly "diligent," albeit unsuccessful, search for the policy. (R.368-370, ¶¶2-7; R.155, ¶10). EL's search for secondary evidence, however, was successful. The evidence obtained and provided to OB during this investigation period included (collectively, the "Secondary Evidence"): (i) a renewal policy issued to EL in 1971 (the "Renewal Policy"), no. "E-Y-40059-8," in which OB states (under the "Employers Commercial Union" corporate name by which OB was formerly known), in the declarations page, that the subsisting policy being renewed is the ELAC policy at issue here (R.370, ¶8; R.374), no. "E-164-00367," and (ii) two certificates of insurance, one signed by OB in 1969 and the other in 1970 (R.372-373), contemporaneously certifying, *inter alia*, that the ELAC policy – no. "E-164-00367" – was issued to EL (in September 1968).

The alleged ELAC policy indisputably required, as conditions precedent to coverage, that (i) written notice be given of any policy-period "occurrence" of coverage-implicating property damage (R.1065, ¶20), (ii) written notice be given of any coverage-implicating "claim" that is "made" against the insured (*Id.*), and

(iii) each such notice be given "within a 'reasonable time under the circumstances.'" (R.24).

B. Huntington

1. The State's December 1986 Report

The Huntington landfill included two waste repositories: (i) the landfill itself and (ii) an incinerator situated atop the landfill. (R.775; R.969). During (and after) the ELAC policy period, EL's carting company was instructed to cart all of EL's off-spec cosmetics to the Huntington incinerator, and not to "landfill" any off-spec cosmetics. (This instruction was given to avoid theft and unauthorized re-sale of these non-conforming goods. (R.979)).

In or around mid-1987, EL learned that the State had issued a public report (dated December 1986), entitled "Inactive Hazardous Waste Disposal Report" (the "State's 12/86 Report"), identifying the Huntington landfill as a source of "groundwater contamination." (R.1207-1208). The State's 12/86 Report suggested that EL's off-spec product had been landfilled at Huntington rather than incinerated, inasmuch as the report cited to these disposals in its "description" of the contaminated "site." The State's 12/86 Report communicated that the State was proposing remedial action, but did not assert any causal connection between EL's disposals and the need for remedial action.

Accordingly, EL promptly hired a consulting firm, A. Guerrera Associates, Inc., to investigate whether disposals made by EL had any causal connection to the need for remedial action. Guerrera issued a report to EL dated September 27, 1987 concluding that although "none" of EL's disposals was found to have "any impact on the quality of the groundwater," the possibility existed that some "broken" containers may have been landfilled, possibly exposing the landfill to trace amounts of the substances in question in and after 1968. (R.1211-1216).

2. EL's 1987 "Notice of Potential Claim"

The combination of the State's 12/86 Report and Guerrera's September 27, 1987 report led EL to issue, by fax, on November 13, 1987, a "NOTICE OF POTENTIAL CLAIM" to all issuers of policies issued in and after 1968 that promised liability coverage for property damage. (R.1193-1218). EL's notice attached the State's 12/86 Report (as well as the September 27, 1987 consultant's report). The listed addressees of this notice included "Commercial Union," the corporate name by which OB was previously known. (R.1194). Among the OB ("Commercial Union") policies referenced in the notice were two policies issued prior to year-end 1971: (i) the ELAC policy ("E-164-00367"); and (ii) the Renewal Policy ("EY 400598") (collectively, the "pre-1971 policies"). (R.1198).

OB responded to EL's 1987 notice in 1989. (R.905). OB's response acknowledged that (i) EL's notice apprised OB of "Estee Lauder's potential

liability with regard to the remediation of [Huntington]" (R.906), and (ii) pursuant to that notice, OB "determined to investigate" the matter. (R.908-909).

3. The 1997 Agreement To Toll The Potential "Huntington" Claim

Prior to 1999, EL's "potential liability with regard to the remediation," noticed by EL in 1987, had not ripened into a civil suit. Nor had the State yet issued a "PRP notice" or "PRP letter" which, under applicable regulations, would commence an administrative proceeding by the presiding environmental agency against the noticed PRP.[1] Nor had the State issued any demand upon EL to pay or do anything to remediate Huntington.

Rather, EL and the State simply entered into consecutive "tolling agreements," in February 1997 (R.813-816), and again in June 1998, reflecting that the State *could not bring* any suit until the tolling period had expired (in 1999). (R.808-812). Neither tolling agreement contained any demand for payment or remedial action by EL.

The tolling agreement was extended a second time in May 1999, via an agreement that referred to itself as a further extension of the opening "1997" tolling agreement. (R.1103-1107).

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[1] *See* 42 U.S.C. § 9612(a).

4. The May 1999 "PRP" Reference And Ensuing Notice

On May 5, 1999, the State wrote a letter to EL and 15 other former users of the Huntington landfill referring to EL (and each of the others) as a "PRP." (R.1316). This was the first letter or notice from the State identifying EL as an actual "PRP" relative to Huntington.

Because issuance of a "PRP letter" or "PRP notice" could be deemed to commence an administrative environmental proceeding (*see* 42 U.S.C. § 9612(a)), shortly after receiving this May 5, 1999 PRP letter, EL gave notice to OB and tendered the defense. (R.826; R.286). EL's notice specifically pointed out that the underlying occurrence was first noticed by EL in its November 1987 "notice of potential claim." (*Id.*).

5. EL's April 2000 Document Production To OB

As part of OB's coverage investigation, in April 2000, EL produced 3,670 pages of documents to OB, stamped "H000001 – H003670." (R.258-259, ¶17). These "H" documents included the most recent tolling agreement executed in May 1999 ("H2497-2501") which, as noted, referred to itself as a further extension of the tolling commenced by the 1997 tolling agreement (and continued by the 1998 tolling agreement).

6. OB's July 2002 Disclaimer

Through mid-July 2002, OB and EL continued their internal investigations for primary and secondary evidence of the ELAC policy – investigations which OB characterized as "diligent." (R.155, ¶10). In the course of the investigations, OB purported not to find any secondary evidence of the policy. (R.321). EL, however, found the dispositive Secondary Evidence previously described and turned all of it over to OB prior to July 2002. (R.315-317).

On July 24, 2002, after neither EL nor OB could find a copy of the policy more than two years into OB's investigation, OB terminated its investigation. Thus, notwithstanding EL's tender of the Secondary Evidence, OB sent a letter to EL dated July 24, 2002, stating that OB was "terminating its investigation of this matter and closing its file" as to "Policy No. E16-40036-27 [the ELAC policy] or any other pre-1971 policy." (R.946) (the "July 2002 Disclaimer"). The lone stated ground for why OB was "closing its file" without providing a defense was that OB "cannot locate any further evidence" of the ELAC policy besides the Secondary Evidence tendered by EL. (*Id.*). That is, OB's position was that "the secondary evidence presented by Estee Lauder [was] insufficient and unreliable to determine the [material] terms and conditions of the [ELAC] policy" (R.13) – a dispositive defense (if true). *See* ARGUMENT Point II.B.1. OB contemporaneously

acknowledged to EL that the July 2002 letter contained "disclaimers of coverage with regard to the pre-1971 policies." (R.13).

The July 2002 Disclaimer concluded with the boilerplate that OB "reserve[s] any and all of its rights . . . ." (R.946).

C. Blydenburgh

1. The 1992 Record On Decision

In October 1992, the EPA issued a public Record on Decision (the "ROD") designating the Blydenburgh landfill for remedial action. (R.598-635). The ROD did not name any persons or entities as PRPs, nor did it identify who was being investigated for purposes of identifying PRPs. The only incident of a hazardous waste disposal mentioned in the ROD did not involve EL, or even the ELAC policy period. The only incident cited in the "summary of decision" attached to the ROD occurred in "June 1978," when "60 or 70 fifty-five gallon drums containing waste dry cleaning solvent were allegedly disposed of at the Site" (by Hickey's Carting Inc.). (R.605). According to this report, all damage identified at the Blydenburgh landfill manifested after June 1978.

2. The 1998 "Blydenburgh" Tolling Agreement

Prior to March 1998, no civil suit for Blydenburgh response costs had been filed. Nor had the State issued any notice concluding that EL was a "PRP" as to

Blydenburgh. Nor had the State issued any demand upon EL to pay for or take remedial action as to Blydenburgh.

In March 1998, the State presented Estee Lauder with a tolling agreement that EL signed on May 1, 1998. (R.1099-1102). The proposed 1998 Blydenburgh tolling agreement was submitted to EL under cover of a letter affirmatively stating that the State was still "conducting an investigation" into which landfill users could be designated as "potentially responsible [parties]" (R.1108) – that is, the State had not completed its "PRP search." The Blydenburgh agreement presented to EL recited that EL, simply by virtue of its status as a user, "may be liable" for Blydenburgh damage. Thus, as the IAS court acknowledged, the agreement established that the State was "not yet designating EL as a PRP." (R.25, 10). Further, the agreement did not suggest that any damage occurred during the pre-1973 period of the landfill's 63-year operating period. The agreement presented by the State also acknowledged that there was no suit the State could bring until after the agreement expired in 1999 (by which time the State would have completed its PRP search).

Prior to executing the Blydenburgh agreement, EL sought, and the State ultimately provided, the State's investigator's notes of interviews of the State's witnesses conducted prior to May 1998 as part of the PRP search. (R.1154-1160). Those interviews established, as the State's investigator later testified, that

(i) although the landfill may have been in operation from "1927 through 1990" (R.1183), "events prior to 1973 were not within the scope of" the investigation (R.1132), (ii) "there are no indications that [Estee Lauder] delivered hazardous wastes to the site" at any time (R.1157), and (iii) the "only" party that reasonably could be classified as a "PRP" based on the information obtained to date was an entity *other than* EL. (R.1160). Thus, the interview notes apprised EL that, as of the date of the agreement, the State's PRP search yielded no factual basis for concluding that EL would be named a PRP for remediation of damage incurred at any time – much less for ELAC policy-period damage (which, as noted, the State was not even investigating).

Finally, EL conducted its own investigation in or around September 1998, obtaining affidavits from additional witnesses. (R.1170-1180). These affidavits provided testimony that no hazardous wastes were landfilled by EL at Blydenburgh prior to (or after) the ELAC policy period. (*Id.*).

3. The March 1999 "PRP" Designation

On March 18, 1999, EL received a letter from the State that, for the first time, identified who the State deemed "PRPs" with respect to Blydenburgh. (R.1308-1311 (the "March 1999 PRP letter")). The list named EL (and an affiliate) and 10 other entities. The March 1999 PRP letter did not indicate

whether this PRP "listing" related to any damage occurring during the ELAC policy period.

4. The State's May 1999 Clarification And EL's Ensuing Notice

After receiving the March 1999 PRP letter, EL immediately requested that the State provide the basis for naming EL a "PRP." By letter dated May 14, 1999 (received by EL on "May 18, 1999") (R.1312-1315), the State responded by stating that it was relying upon the "results of [the] PRP search," and referred EL to the same interviews which established that EL disposed only of non-hazardous cardboard and caused Mr. Cotilla to conclude that there was *no basis* for naming EL a PRP. (R.1312).

However, if a disposal of "cardboard" were now somehow sufficient to implicate a "hazardous disposal" at all, it necessarily would implicate a hazardous disposal for any period that cardboard was disposed of in the landfill – which was *all* periods during which EL used the landfill. Accordingly, just two days later, EL issued a notice to OB, served on May 20, 1999, under "any and all applicable policies" issued by OB. (R.817-825). By that notice, EL also tendered its defense to any "PRP" administrative proceeding.

5. EL's April 2000 Document Production To OB

In April 2000, as part of OB's coverage investigation and at OB's request, EL produced to OB 2,935 pages of additional documents stamped "B000001 –

B002935." (R.262). One of the documents provided to OB was the 1998 Blydenburgh tolling agreement ("B000645-48" (R.1099-1102)). On July 6, 2000, OB acknowledged to EL that OB had received and read the 1998 tolling agreement. (R.932).

6. The July 2002 Disclaimer

The July 2002 Disclaimer discussed in paragraph B(6), *supra,* not only responded to EL's coverage request as to Huntington, but it also responded to EL's coverage request as to Blydenburgh.

As noted, the letter asserted a ground for denying liability under the ELAC policy (the supposedly insufficient proffer of secondary evidence of the policy's insuring terms) – but did *not* disclose OB's position that the facts then known to OB somehow translated into some "untimely notice" defense.

D. The September 2002 *Hickey's* Suit

In September 2002, after Hickey's Carting, Inc. ("Hickey's") – the party that allegedly made the June 1978 disposal of 55-gallon drums of hazardous waste referenced in the ROD's "summary of decision" – had been sued by the State, Hickey's filed a third-party complaint against EL. The third-party complaint (erroneously) alleged that EL also landfilled hazardous disposals at Blydenburgh, and that it did so as far back as "1968." (R.441-442, ¶¶174-181). EL noticed the suit to OB within one week of receipt of the suit papers. (R.331; R.947).

In November 2002, just before EL's answer to the third-party complaint was due, OB denied a defense to the suit and reiterated as the basis for this acknowledged "disclaimer" under any and all "pre-1971 policies" the same basis it communicated in its July 2002 Disclaimer (as discussed at paragraphs B(6) and C(6), *supra*). OB stated:

> [W]ith regard to Estee Lauder's tender of defense for the [Hickey's] action, *OneBeacon stands by its prior disclaimers of coverage with regard to the pre-1971 policies* issued by Commercial Union.
>
> Estee Lauder's present tender of defense for the third-party complaint is based on an alleged Commercial Union policy, No. E16-40027 [sic], on the risk from September 18, 1968 to September 18, 1971.... *[W]e advised you, by letter dated July 24, 2002, that OneBeacon was closing its file.... Please be advised that OneBeacon has determined, at this time, it will not revisit its prior determination.*
>
> * * *
>
> OneBeacon has determined it will not provide Estee Lauder with a defense in the [Hickey's] action.

(R.951-957) (the "November 2002 Disclaimer") (emphasis added).

As with the July 2002 Disclaimer (for Huntington and Blydenburgh), the November 2002 Disclaimer (for *Hickey's*) also did not assert that the Blydenburgh occurrence purportedly underlying the *Hickey's* suit had been untimely noticed. And, again, OB did not allege that the State (or anyone else) had "made a claim" that EL had failed to notice to OB.

The November 2002 Disclaimer reiterated the boilerplate "any-and-all" reservations clause.

E. EL's Coverage Suit

In OB's initial responsive pleading filed in September 2005, OB disclaimed coverage (again), stating: "OneBeacon is not obligated to defend and/or reimburse defense costs...." (R.1004, (b)). While the Answer reiterated the defense articulated in OB's 2002 disclaiming correspondence that the secondary evidence tendered by EL failed to establish the policy's material terms and conditions (R.992, ¶28), the Answer did *not* assert that EL actually failed to meet, as to either site, the respective requirements of reasonable notice of occurrence and/or reasonable notice of claims. Instead, the Answer simply posited an incontestable tautology: that "*to the extent*" EL failed to meet one or more of the various "notice and cooperation requirements" that the law implies in all policies, OB was "not liable."[2]

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[2] The one affirmative defense mentioning "notice requirements" cited by the IAS court is set forth below (R.997)(emphasis added):

"Fourth:

> OneBeacon is not liable to Plaintiff *to the extent* that there has been a failure to perform or comply with any of the obligations or conditions that may be contained in the alleged insurance policy allegedly issued by ELAC, including, but not limited to, the notice and cooperation requirements.

In Spring 2006, EL moved for summary judgment on its claim that OB owed a duty to defend (based on the Secondary Evidence) and breached that duty (based on the underlying allegations asserted against EL).

In OB's cross-motion for summary judgment dismissing the complaint, OB asserted, for the first time, that EL actually did fail to meet a notice requirement – i.e., that EL failed to provide timely notice that the State "might bring suit" for policy-period property damage at Huntington and Blydenburgh, respectively. (R.479, ¶8; R.18). According to OB, the fact that EL had entered into agreements in or before June 1998 tolling the State's time to make a claim against EL – a fact known to OB since mid-2000 – established that EL's May 1999 notice was "untimely." OB also asserted that such "untimely notice" as to Blydenburgh precluded coverage of the *Hickey's* suit because that suit arose out of the allegedly untimely-noticed "Blydenburgh occurrence." EL responded that "timely notice" was academic, by operation of "constructive waiver." (R.1093-1095, ¶¶9-13; R.19). EL further argued that, in any event, it *did* provide timely notice that the "State might bring suit." (R.1095-1096, ¶¶14-22).

In its reply, OB relied on an unpublished lower-court opinion that granted summary judgment to the *insured* on an untimely notice defense, but which contained dicta that OB cited for the novel proposition that an insurer *unilaterally excepts itself* from the prohibition against piecemeal disclosures of coverage-

forfeiture defenses merely by using language communicating the possibility that this prohibition was being violated. According to OB, its use of such language in its 2002 disclaimer letters (via a reservations clause) not only excepted OB from its duty to make non-selective disclosures in a disclaimer letter, but further permitted OB to delay disclosure of its "untimely notice" defense until after this litigation commenced – more than three years after OB disclaimed on different grounds and more than five years after it learned the facts allegedly establishing that defense. (R.21).

EL duly requested oral argument (R.1656), but the IAS court denied that request and ruled on the papers.

F. The IAS Court's Ruling

The IAS court held that the first time EL gave cognizable notice to OB of the "potential claims" at Huntington and Blydenburgh (R.27) – i.e., that the "State might bring suit" (R.25) – was in May 1999. (R.27). The court held that such notice of occurrence was unreasonably late as a matter of law because it came more than eleven months after the date of the "trigger [for] Estee Lauder's obligation to notify OneBeacon under the terms of the putative policy" (R.25, 27) which, the IAS court held, was when EL was first "[on] notice ... that the State might bring suit against [EL]" for property damage incurred during the ELAC policy period (R.27) (absent some "reasonable" and "good faith belief [by EL] of

non-liability" (R.28)). According to the IAS court, EL was on such notice no later than the date of each of the tolling agreements, which were dated in or before June 1998.

The court rejected EL's reliance on its 1987 "notice of potential claim" as to Huntington. Although the 1987 notice followed a suit-threatening public report by the State (i.e., the State's 12/86 Report), the court held it was not notice that another "might bring suit" because EL "had not [yet] been contacted by [the State]." (R.15, n.13). (The court cited no legal authority for its assumption that only "contact" by the potential plaintiff can implicate a potential suit.)

The IAS court contradicted this reasoning when it came to Blydenburgh, holding that it was *not* relevant that the State *did make* contact with EL, even though *what* the State communicated was the State's belief that it was *without* basis to identify EL as a PRP in mid-1998 or to allege any occurrence of property damage during the ELAC policy period. For the Blydenburgh occurrence, all that was relevant to the court was that EL's waste, even if mere cardboard waste incapable of causing damage, was all that was alleged to have been disposed at the landfill during the ELAC policy period. Notwithstanding, the court held that EL had to reasonably anticipate, as a matter of law, a valid suit alleging that EL's waste caused policy-period damage. (R.27).

The IAS court then turned to, and rejected, EL's "constructive waiver" argument as to each landfill. The court, relying on dicta in the unpublished lower-court opinion first cited by OB in its reply brief, agreed with OB that "the law" permits an insurer to unilaterally except itself from its duty to make non-partial and prompt disclosure of all known coverage-forfeiture defenses and, further, that OB did communicate the possibility that other reasons existed for denying liability via the blanket reservations clause contained in OB's 2002 disclaimer correspondence. (R.30-32).

As for the failure of OB's Answer to allege that EL failed to meet one or more of the written notice requirements imposed by law – the court simply *re-wrote* OB's Fourth Affirmative Defense to *make it* contain such an affirmative allegation. In reciting what OB pleaded, the court simply eliminated, through its placement of an ellipsis, the "to the extent" phrase in the pleading indicating that an *actual* failure to provide timely notice was *not* being alleged. To complete the transformation of the hypothetical into the affirmative, the court then replaced OB's "to the extent" phrase with its own "EL failed" phrase to forge an affirmative allegation of an actual violation of some (but still unidentified) notice requirement.[3]

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[3] The Opinion mischaracterized the Fourth Affirmative Defense as alleging as follows (R.34) (ellipses provided by IAS court):

ARGUMENT

I.

SUMMARY JUDGMENT WAS ERRONEOUSLY GRANTED TO ONEBEACON

A. The IAS Court's "Exception" to Constructive Waiver Does Not Exist

1. The Insurer's Duty To Disclose Known Coverage-Forfeiture Defenses

The law "requires an insurer to advise and inform its insured so that the insured will have sufficient information to make intelligent decisions to protect his own interests." Shernoff, Gage & Levine, *Insurance Bad Faith Litigation*, Sec. 3.04(3) at p. 3-28 (Supp. 2005); *The Anthony D. Nichols v. Hartford Fire Ins. Co.*, 49 F.2d 927, 930 (D.N.Y. 1931) (under New York law, insurer owes "duty" not to selectively withhold known coverage-forfeiture grounds).

Thus, piecemeal disclaimers – the inherently "manipulative strategy" whereby an insurer disclaims on one ground "while holding in reserve another, perhaps stronger, [coverage-forfeiture] defense" (*Lauder v. First UNUM Life Ins. Co.*, 284 F.3d 375, 382 (2d Cir. 2002)) – violates the insurer's duty of disclosure. *Id.; Metropolitan Radiological Imaging, P.C. v. State Farm Mut. Auto. Ins. Co*, 7

Estee Lauder failed to "perform or comply with any of the obligations or conditions that may be contained in the alleged insurance policy allegedly issued ... including, but not limited to, the notice and cooperation requirements."

Misc.3d 675, 679, 790 N.Y.S.2d 373, 378 (Civ. Ct., Queens Co. 2005) (because piecemeal disclaimers are "prejudicial [and/or] dilatory," the "Appellate Division, Second Department, has repeatedly warned insurers against ... repudiating liability ... on one particular ground and then, shifting gears, creating new means or defenses to avoid payment"). As the Court of Appeals has recognized, the prejudice of selective disclosure of known coverage-forfeiture defenses is that it creates "difficulty assessing whether the insurer will be able to disclaim successfully [in litigation]." *Gen. Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512, 514 (1979).[4]

In addition to requiring that any disclosure of defenses in a disclaimer letter be non-selective, the duty of disclosure also requires, as the IAS court correctly recognized, that the insurer "give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it first learns of the . . . grounds for disclaimer of liability." (R.29 (citing authorities)). As the IAS court acknowledged, under the rule of law articulated by the First Department in *151 E. 26th St. Assoc. v. QBE Inc. Co.*, 33 A.D.3d 452, 453, 823 N.Y.S.2d 24, 25 (1st Dep't 2006), an insurer breaches that duty, without more, where it does not "raise the lack-of-prompt-notice defense until *more than three years* after receiving

[4] By statute (N.Y. Ins. Law § 3420), the insurer's duty to disclose known coverage-forfeiture defenses has been extended, in personal injury situations, to also include *scope*-of-coverage

[notice of facts underlying that defense]." (R.34 (emphasis added)). The duty of timely disclosure also is breached as a matter of law if a known coverage-forfeiture defense is not disclosed until after the insurer's Answer is filed. *Hotel des Artistes, Inc. v. General Accident Ins. Co.*, 9 A.D.3d 181, 775 N.Y.S.2d 262 (1st Dep't 2004).

The third aspect of the insurer's disclosure duty is the requirement that the coverage-forfeiture defense be enumerated "with a high degree of specificity." *Cirucci*, 46 N.Y.2d at 864. Inasmuch as the law implies into all insurance policies the *multiple* written-notice requirements of reasonable "notice of occurrence" (as to each occurrence and claim at issue) and "reasonable notice of claim" (as to each occurrence and claim at issue) (*Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 95 (2d Cir. 2002)) – the insurer's disclaiming correspondence or pleading must name *which* of these multiple notice requirements have been breached and *what material facts* establish each alleged breach. *See, e.g., Aetna Cas. & Sur. Co. v. Nat'l Union Fire Ins. Co.*, 251 A.D.2d 216, 219, 674 N.Y.S.2d 685, 687 (1st Dep't 1998) (insurer's disclaimer on grounds that insurer failed to meet the policy's "written notice" requirements failed to cognizably allege a failure to provide reasonable "written notice *of [] claim*"); *Benjamin Shapiro Realty Co. v.*

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defenses (not applicable here).

Agricultural Ins. Co., 287 A.D.2d 389, 731 N.Y.S.2d 453 (1st Dep't 2001) (insurer's disclaimer on grounds of "untimely-notice-of-occurrence" defense was insufficient for failure to specify the material facts establishing that defense).[5]

With respect to the remedy for a breach of the duty of disclosure of known coverage-forfeiture defenses, the starting point is New York's public policy, which abhors coverage forfeitures. *Albert J. Schiff Assocs., Inc. v. Flack*, 51 N.Y.2d 692, 699, 435 N.Y.S.2d 972, 974-75 (1980). Given both the public policy disfavoring coverage forfeitures and the fact that any breach of the duty to disclose known coverage-forfeiture defenses necessarily is intentional, the law conclusively deems any breach of the duty to disclose known coverage-forfeiture defenses to be a waiver of the concealed coverage-forfeiture defense. *Id.*; *Benjamin Shapiro Realty Co.*, 287 A.D.2d at 389 (disclaimer letter that selectively withholds disclosure of a known untimely notice defense waives the defense (notwithstanding a clause reserving any and all rights)); *QBE,* 33 A.D.3d at 452 (waiver of any untimely-

[5]The insurer's implied duty of disclosure of an "untimely notice" defense is independent of the insurer's duty to defend or indemnify, *State of New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1423 (2d Cir. 1991) (insurer's duty to disclaim on grounds of "untimely notice of occurrence" defense arose before any suit had been commenced against the insured which the insurer was required to defend), and is enforceable even where the policy is lost or its terms or in dispute, inasmuch as the requirement that an insured give reasonable notice of occurrences and claims is imposed as a matter of law. There is no genuine dispute as to whether the ELAC policy establishing the insurer-insured relationship between OB and EL actually issued. *See* Point II.B.1, *infra.*

notice defense where insurer delayed "more than three years" before disclaiming on that basis).

2. An Insurer Cannot Except Itself From Its Duty of Disclosure

This is not the first time the Appellate Division has confronted an insurer who, notwithstanding the duty to make non-selective disclosure of defenses in its initial disclaimer letter, argued that the insurer may selectively disclose known defenses so long as the insurer used language indicating that the insurer was (or might be) doing so. In *Allstate Ins. Co. v. Moon*, 89 A.D.2d 804, 453 N.Y.S.2d 467 (4th Dep't 1982), the insurer issued a disclaimer letter admitting to the existence of undisclosed "other reasons" for disclaiming coverage (besides those enumerated in the letter). The Court held that by this language, the insurer *breached* – rather than "excepted" itself from – its disclosure duty and, thus, waived its unnamed "other" undisclosed coverage-forfeiture defenses as a matter of law. *Id.* *Allstate* teaches that the issue relevant to waiver is not whether the insured is informed of the *fact* that the insurer is withholding the identity of one or more coverage-forfeiture defenses, but rather it is whether the insured has been informed of *what are* those "other" known defenses.

The holding in *Allstate* renders this case *a fortiori*. Here, the court posited that a reservations clause "reserves" a "right" to make piecemeal disclosures of

known coverage-forfeiture defenses and, thus, "reveals" that the insurer's disclaimer letter is not necessarily setting forth all known coverage-forfeiture defenses. However, if that were so, the clause would also communicate that the insurer considers itself free to ignore its disclosure duty *not* to leave the insured guessing as to whether the insurer is making a selective disclosure of known defenses and *to affirmatively make* a non-selective and prompt disclosure of known coverage-forfeiture defenses. Thus, an insurer such as OB who makes a piecemeal disclosure of known defenses under cover of a reservations clause is in *greater* violation of the duty of disclosure than the insurer in *Allstate*. The defense-waiving insurer in *Allstate* at least disclosed *the fact* that the insurer knew of and was selectively concealing other reasons. A reservations clause, by communicating merely that other reasons "might be" known to the insurer, leaves the insured guessing even as to even the fact that a selective disclosure is being made. In any event, it is black-letter law that an insurer cannot, by unilateral act or proclamation, except itself from the express or implied duties owing under its insurance contract. *Cardinal v. State*, 304 N.Y. 400, 410-11 (1952). For this reason alone, a reservations clause in a disclaimer letter cannot effectively extend the insurer's time to disclose known coverage-forfeiture defenses.

Even if an insurer did have the power to unilaterally except itself from its duty not to selectively disclose known coverage-forfeiture defenses, a reservations

clause fails to unambiguously speak to known coverage-forfeiture defenses. That is because one can only "reserve" a right that exists in the first place, and it is indisputable that an insurer has no pre-existing "right" to make piecemeal disclaimers of known coverage-forfeiture defenses. As noted, the opposite is true: an insurer actually owes a duty *not* to do so. For this additional reason, a reservations clause in a disclaimer letter cannot effectively extend the insurer's time to disclose known coverage-forfeiture defenses.

Prior to the IAS court's ruling, no New York court had held that a reservations clause in a disclaimer letter *does* unilaterally empower the insurer to make a selective disclosure of known coverage-forfeiture defenses, much less to carry on that concealment for more than five years. Moreover, in one of the very cases cited by the IAS court – *State of New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1429-30 (2d Cir. 1991) – the Second Circuit held that coverage-forfeiture defenses can be "reserved" for later enumeration *only to the extent* that they depend upon future developments, e.g., the content of an as-of-yet-unfiled complaint against the insured.[6] *Accord Mount Vernon Fire Ins. Co. v. William Monier Constr. Co.*, No. 95 Civ. 0645, 1996 US Dist LEXIS 11297, at *12

[6] *See* pp.36-37 for a more expansive discussion of *AMRO*.

(S.D.N.Y. Aug. 5, 1996) (under *AMRO*, the only defenses capable of being "reserved" are those that may first become applicable "in the future").

Similarly, in another case approvingly cited by the IAS court (R.33), *TIG Ins. Co v. Town of Cheetowaga*, 142 F.Supp.2d 343 (W.D.N.Y. 2001), the court held that a clause purporting to reserve "all" rights is deemed to denote only unspecified coverage-forfeiture defenses *not currently known to the insurer*. *Id.* at 366-67 (constructive waiver of "late-notice-of-occurrence" defense where insurer, with knowledge of that defense, singled out a different ground – lack of "coverage" – while "reserving all of its [other] rights" to assert other defenses later); *see also Olin Corp. v. Ins. Co. of N. Am.*, No. 84 Civ. 1968, 2006 U.S. Dist. LEXIS 8028, at **9-10 (S.D.N.Y. Mar. 2, 2006) (citing *TIG* for proposition that where an insurer "actually asserts certain policy defenses, whether [subject to] a reservation-of-rights [or not], the insurer is deemed to have waived any other unasserted [known] grounds for [forfeiture]").

In a nutshell, a reservations clause confirms that the insurer is not waiving any right to assert, in the future, those defenses which it has a subsisting right to assert in the future, *i.e.*, (i) coverage-forfeiture defenses which are *merely putative*, and (ii) any *scope*-of-coverage defenses (if the claim does not involve personal injury (*see* note 4, *supra*)). Accordingly, the law holds that selective concealment of a coverage-forfeiture defense *does* trigger a waiver of the selectively-concealed

defense *notwithstanding* a reservations clause. The chart below sets forth examples of disclaimer letters held to waive a selectively-concealed coverage-forfeiture defense *notwithstanding* the presence of a reservations clause:

Decision	Reservation of Rights Clause
Benjamin Shapiro Realty Co. v. Agricultural Ins. Co., 287 A.D.2d 389, 731 N.Y.S.2d 453 (1st Dep't 2001)	"Please do not construe any of the foregoing, or any other actions undertaken by us and our representatives, as a waiver of any of the terms and conditions of the policy, or of *any rights or defenses* provided by law, *all* of which are *expressly reserved.*" (R.1689) (emphasis added).
Mutual Redevelopment Houses, Inc. v. Greater N.Y. Mut. Ins. Co., 204 A.D.2d 145, 147, 611 N.Y.S.2d 550, 552-53 (1st Dep't 1994)	"[We reserve] *all other rights* under the applicable policy provisions with respect to matters that *may be [relevant]*" (as well as reserving rights as to matters that only "become" relevant later).
Hotel Des Artistes, Inc. v. General Acc. Ins. Co., 9 A.D.3d 181, 185, 775 N.Y.S.2d 262, 265 (1st Dep't 2004)	"[We are] *not waiving any rights or defenses under the policy not mentioned* in the disclaimer letter."
TIG Ins. Co. v. Town of Cheektowaga, 142 F.Supp.2d 343, 365 (W.D.N.Y. 2001)	"[We are] *reserving all of its rights* with respect to this claim, including the right to disclaim coverage entirely. . . ."

The reservation clause in OB's 2002 disclaimer correspondence is substantively identical to those quoted above: "[OB] reserve[s] any and all of its rights and defenses" (R.946; R.329).

In *Benjamin Shapiro Realty*, this Court held that a disclaimer letter that selectively disclosed defenses could not avert a waiver of a known "untimely notice" defense – even though that letter did contain a reservations clause –

because such a "disclaimer *must* provide" all known grounds in "very specific" terms, such that "a [known] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense." 287 A.D.2d at 389. Given that this was the Court's explicit holding, anything about the content of a disclaimer other than the presence (or absence) of a very specific enumeration of the defense ultimately relied-upon would be utterly irrelevant. Thus, this Court's express holding mooted any need to discuss whether the disclaimer letter before it did or did not contain a reservations clause. Yet, the IAS court somehow inferred that opinion's "silence" on the reservations clause somehow meant that a reservations clause was *not* included and, thus, that this Court's holding about what the insurer "must" do to avert waiver could not be taken literally. (That fallacy is now exposed fully by the content of that disclaimer letter which, upon EL's prior motion in this Court, has been judicially noticed. (*See* Motion to Enlarge, July 13, 2007)).[7]

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[7] In the period between this Court's decision in *Benjamin Shapiro Realty* and the IAS court's ruling below, four other State and federal courts rendered decisions further articulating that to avert waiver, under this Court's precedent, an insurer *must* make non-selective disclosure of known coverage-forfeiture defenses – a rule of law that renders a reservations clause irrelevant as applied to such defenses. *See, e.g., Prus v. Glencott Realty Corp,* 10 A.D.3d 390, 780 N.Y.S.2d 499 (2d Dep't 2004); *Kokonis v. Hanover Ins. Co.*, 279 A.D.2d 868, 719 N.Y.S.2d 376 (3d Dep't 2001); *Palanquet v. Weeks Marine, Inc.*, 352 F.Supp.2d 361 (E.D.N.Y 2005); *U.S. Underwriters Inc. Co. v. Falcon Constr. Co.,* No. 02 CV 4179, 2004 U.S. Dist. LEXIS 12445 (S.D.N.Y. June 29, 2004). (Should OB wish to argue that the disclaimer letters that were before these four courts did *not* contain a reservations clause, EL would not object to this Court taking judicial notice of such public court documents to put such an assertion to the test.)

The IAS court made another erroneous and illogical assumption to avoid another precedent of this Court, namely, *Hotel des Artistes, supra.* In that case, the insured argued that there were two independently sufficient grounds for finding constructive waiver: (i) the insurer's failure to specify untimely notice of occurrence in a pre-suit disclaimer, and (ii) the insurer's failure to specify untimely notice of occurrence in its answer to the complaint. The First Department held that constructive waiver was established by the first ground "and" the second ground. 9 A.D.3d at 193. The IAS court, however, assumed that the word "and" was intended by this Court to communicate that this Court would have ruled against the insured unless *both* grounds had been established, and thus did not mean that *each* ground constituted an *independent* basis for waiver. (R.33-34). This assumption was wrong because it is indisputable that a failure by an insurer to plead non-compliance with a condition precedent as an affirmative defense in the insurer's answer (the second ground identified by the First Department) waives that defense *without more* (see authorities cited in Point I.B, *infra.*). *Ergo*, the second ground – the insurer's pre-suit selective disclosure – would have been meaningless unless it was regarded by this Court as an *alternative independent ground* for finding constructive waiver. Clearly, that ground was *not* regarded as meaningless, as it was identified as one of the facts relied upon by this Court for its ruling.

After eschewing the actual holdings of those two binding First Department cases, the IAS court chose to rely on *dicta* in an unpublished trial-court opinion, *General Ins. Co. of Am. v. Marvel Enterprises, Inc.,* No 604690/01, 2004 WL 483212 (N.Y. Cty. Mar. 9, 2004).[8] Although the IAS court insinuated that *Marvel* held that the insurer averted waiver of a valid untimely notice defense via a reservations clause in a disclaimer letter, *Marvel* actually (i) granted summary judgment to the *insured*, holding that the insurer's "untimely notice" defense was *not* valid (*id.* at *6-7); and (ii) discussed, in *dicta*, whether waiver could be effected by a letter that was *not* a "disclaimer letter," much less a letter analogous to the disclaimer issued here by OB.

On the second point, unlike OB's 2002 disclaiming correspondence, the insurer's letter in *Marvel* neither denied a defense to the underlying proceeding nor enumerated a defense that would obviate coverage to any judgment that might eventuate from the underlying proceeding. Nor did the *Marvel* letter advise the insured that the insurer had terminated its investigation or closed its file – the ultimate consequence of a disclaimer. Rather, the *Marvel* letter affirmatively acknowledged that "the policy did provide coverage" because the insured's allegedly infringing conduct was actionable *both* as trademark infringement (a

[8] The official reporters provide merely a table cite to *Marvel.* *See* 2 Misc. 2d 1003(A) and 784 N.Y.S. 2d. 920.

covered theory of recovery) *and* as breach of contract (an excluded theory of recovery). 2004 WL 483212, at *2-3. *Id.*[9]

Not surprisingly, the four cases cited in *Marvel* (each of which was cited, in turn, by the IAS court) – (i) *National Restaurants Mgmt., Inc. v. Executive Risk Indem., Inc.,* 304 A.D.2d 387, 388, 758 N.Y.S.2d 624 (1st Dep't 2003), (ii) *Raniolo v. Travelers Indem. Co.,* 279 A.D.2d 514, 718 N.Y.S.2d 884 (2d Dep't 2001); (iii) *Compis Servs., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.,* 272 A.D.2d 886, 708 N.Y.S.2d 770 (4th Dep't 2000), and (iv) *AMRO*, 936 F.2d 1420 – do not recognize, much less apply, any "exception" to the duty to make non-selective disclosure of known coverage-forfeiture defenses in a disclaimer letter.

In *National Restaurants, Inc.,* waiver of coverage-forfeiture defenses was not even at issue. Rather, the insured erroneously argued that the constructive waiver doctrine applies to a *non*-forfeiture defense, to wit, a *scope*-of-coverage defense. This Court rejected that assertion, citing to the page of the Court of Appeals' decision in *Albert J. Schiff & Assoc., Inc.*, 51 N.Y.2d 692, that articulates

[9]Thus, the *Marvel* insurer was following the rule of law holding that a duty to defend exists so long as the liability-creating conduct is actionable under any non-excluded theory of recovery even if it is also actionable under an excluded theory of recovery. *See, e.g., Houbigant, Inc. v. Federal Ins. Co.*, 374 F.3d 192, 203 (3d Cir. 2004).

the common law rule that only coverage-*forfeiture* defenses can be constructively waived by selective or untimely disclosure

In *Raniolo* and *Compis Services, Inc.*, the insurer's correspondence (issued prior to termination of the insurer's investigation), did not deny a defense to the underlying proceeding, nor did it specify fewer than all known coverage defenses. Rather, in each case, the non-enumerated defense – lapse of a contractual limitations period – was incapable of being known to the insurer inasmuch as the letter was issued *before* the limitations period expired.

In *AMRO*, 936 F.2d at 1423, as previously noted, the Second Circuit held that disclosure of a known "untimely notice of occurrence" defense could *not* be held in reserve. In *AMRO*, the insurer issued a pre-suit letter to the insured repudiating any obligation to defend a threatened CERCLA suit, but the letter failed to assert that the insured had breached the policy's timely-notice-of-occurrence requirement – even though the insurer had constructive knowledge of the facts allegedly establishing such breach. The Court rejected the insurer's argument that the defense of "untimely-notice-of-occurrence" does not become currently-applicable until after a complaint was filed against the insured. The Court stated that while there may be some coverage-forfeiture defenses that, theoretically, would not exist until the contents of a yet-to-be-filed complaint became known, "untimely-notice-of-occurrence" was not such a defense.

Accordingly, the Second Circuit stated that it need "not address" the insurer's argument that an insurer "may" hold in "reserve" a defense which, unlike "untimely notice of occurrence," might truly be dependent on the contents of a still-unseen complaint or other unknown future events. *Id.* at 1423. Thus, the only defenses that *AMRO* "excepted" from the scope of its *per se* rule were *putative* coverage-forfeiture defenses that, as such, could not be known.

Thus, to the extent the *Marvel dicta* suggests that a disclaiming insurer has a pre-existing right to make piecemeal disclaimers (and thus may hold in "reserve" *known* coverage-forfeiture defenses for subsequent piecemeal deployment), that *dicta* would be directly at odds with the very case – *AMRO* – that *Marvel* approvingly cites. Indeed, the same court that decided *AMRO* reiterated in *Lauder* that *AMRO* does *not* permit an insurer to "hold[] in reserve" a known defense so that, "should the first one fail," the insurer could take a later "bite of the apple." *Lauder,* 284 F.3d at 382; *accord Mount Vernon Fire Ins. Co.,* 1996 US Dist LEXIS 11297, at *13 (under *AMRO*, only defenses which can be "reserved" are those that may first become applicable "in the future").[10]

[10] The only proposition for which *this* Court has approvingly cited *AMRO* is that "a new [but known coverage-forfeiture] defense *cannot* be invoked after an insurer has disclaimed coverage on separate grounds." *Mutual Redevelopment Houses, Inc. v. Greater N.Y. Mut. Ins. Co.*, 204 A.D.2d 145, 147, 611 N.Y.S.2d 550, 552 (1st Dep't 1994).

Marvel and the four cases it cites also did not involve a multi-year delay between the time the insurer learned of the facts which allegedly translate into an "untimely notice" defense and the date it first raised that defense. Yet, the IAS court held that in the wake of *Marvel*, the fact that "OneBeacon possessed sufficient knowledge to assert a late-notice defense [in or before 2002] is inconsequential under the circumstances, in light of OneBeacons' reservation of any and all rights" in its 2002 disclaiming correspondence. (R.32). Of course, *even if* there were magic language that an insurer could use in a disclaimer letter to unilaterally except the insurer from its duty to make non-selective disclosure in that same disclaimer letter, that would not mean that the duty to *promptly* disclaim must be obviated by that same language. As this Court's recent decision in *QBE* holds, the duty not to delay unreasonably in disclaiming based on known coverage-forfeiture grounds is *independent* of the duty to refrain from piecemeal disclosures. Indeed, it is theoretically possible that the time taken by an insurer between piecemeal disclaimers could be quite brief, such that the piecemeal disclaimers could breach the duty to make *non-selective* disclosures *without* breaching the duty to make a *prompt* disclosure of all known coverage-forfeiture grounds. So, something "excepting" an insurer from one duty would *not* necessarily "except" it from the other.

Furthermore, even if the right to make piecemeal disclosures existed so as to be capable of being "reserved" by a "reservation of all rights," *QBE* confirms that the right to delay disclosure of a known coverage-forfeiture defense "more than three years" (and/or after the insurer's answer is filed) never exists and, thus, cannot be "reserved." Indeed, even if an insured were to make an express agreement that the insurer could perform its disclosure duties via sequential piecemeal acts, the insurer still would be required not to delay unreasonably in rendering its final act of performance disclosing the last of its remaining known coverage-forfeiture defenses. *See Tanney v. Greaux*, 174 A.D.2d 728, 571 N.Y.S.2d 765, 767 (2d Dep't 1991) (performing party owes implied duty not to delay unreasonably between sequential acts of performance); *John T. Brady & Co. v. Board of Education*, 222 A.D. 504, 226 N.Y.S. 707 (1st Dep't 1928) (delay of more than three years breaches implied duty to timely perform as matter of law). So, OB seeks to be put in a better position through its *unilateral* reservations clause than if EL had *bilaterally agreed* that OB could perform its disclosure obligations via piecemeal disclaimers.

Thus, under *QBE*, rather than being "inconsequential," the fact that "OneBeacon possessed sufficient knowledge to assert a late-notice defense" in or before 2002 (indeed, in or before mid-2000) compels a finding of waiver – with or

without a clause purporting to "except" OB from its duty to make non-selective disclosure.[11]

B. OB's Answer Independently Effects Waiver

Unlike correspondence issued by the insurer during the pre-suit period, an Answer denying liability under a policy upon which the insured has brought suit is, indisputably, the insurer's last chance to enumerate known affirmative defenses. *See* CPLR § 3015. Thus, the insurer must enumerate all known defenses irrespective of what has or has not been specified in any correspondence that may have gone before.

Because there is no cognizable point in time for asserting a known-but-unpleaded defense *after* the Answer is filed, the Answer is legally incapable of "reserving rights" to assert a known defense at some later date. If the disclaimer in the Answer fails to enumerate a known coverage-forfeiture ground with the requisite very "high degree of specificity" required of any disclaimer under *Cirucci,* 46 N.Y.2d at 864, that ground is, without more, waived. *Id.*; *Hotel des Artistes*, *supra*, 9 A.D.3d at 193; *accord Commercial Union Ins. Co. v. Int'l*

[11]Of course, OB's waiver of its supposed untimely-notice-of-*occurrence* defense also precludes, as a matter of law, any assertion of untimely-notice-of-*claim* relative to any claim arising from such allegedly belated-noticed occurrence. *AMRO*, 936 F.2d at 1430 n.10; *TIG*, 142 F.Supp.2d at 365 ("[E]ven if an insurer timely disclaims based on a late notification of a claim, but fails to timely disclaim based on a late notice of the occurrence upon which the claim is based, the insurer is held to have waived its late notice disclaimer....").

Flavors & Fragrances, Inc., 822 F.2d 267, 274 (2d Cir. 1987) (to effectively disclaim for late-notice-of-occurrence, insurer must at least "unambiguously stat[e] [its] belief that [insured's] notice of an occurrence was late"); *cf.* CPLR § 3015 (to preserve defense that plaintiff failed to satisfy a "condition precedent", the defendant must allege such failure in its Answer "specifically and with particularity").

First, the Fourth Affirmative Defense upon which the IAS court relied does *not* even conclusorily state OB's belief that EL failed to comply with the "notice-of-occurrence" requirement (or any other notice requirement) as to any of the multiple occurrences. OB's defense merely alleged that coverage would be lacking "*to the extent*" EL failed to comply with one or more of the multiple "notice and cooperation requirements." *See* note 2, *supra*. As the IAS court acknowledged elsewhere, the phrase "to the extent" merely signals an attempted "reservation of rights." The court (correctly) characterized a November 1999 letter from OB in which that same "to-the-extent" phrase appeared as merely a "reservation-of-rights" letter, and thus not a "disclaimer." (R.31).[12] The November 1999 letter stated: "*To the extent* [OB] was not provided with notice of

[12] *Accord U.S. Underwriters*, at *12 n.5 (language that communicates "merely a reservation of rights" to disclaim on untimely-notice grounds does not satisfy or obviate the insurer's duty to timely and non-selectively disclose that such putative defense has, pursuant to the insurer's subsequent investigation, ripened into an actual ground for disclaiming coverage).

[a] claim in a timely manner, there may be no coverage." (R.924; R.282) (emphasis added). Thus, there is no substantive distinction between the language in that admittedly non-disclaiming "reservation-of-rights letter" – and the language in the Fourth Affirmative Defense that the IAS court held was a disclaimer on untimely-notice grounds.

Rather than explain how a phrase that signals a mere "reservation-of-rights" when used in a *letter* by OB must be deemed to be unequivocal "disclaimer" language when used in an *Answer* by OB, the IAS court simply re-wrote the Fourth Affirmative Defense to substitute its own affirmative language of disclaimer – "Estee Lauder failed" – for OB's hypothetical (and non-disclaiming) language. *Compare* note 2 *with* note 3, *supra.*

Second, even if OB's Answer had contained the words substituted by the IAS court, i.e., that EL "failed" to comply with one or more of the multiple (but unidentified) "notice and cooperation requirements," those words still fail to impart the specificity required to avoid waiver. As noted, the insurer's duty is to specify, as to each occurrence, *which* coverage-forfeiture condition is contended to have been violated. Not only are "notice" and "cooperation" requirements separate and distinct categories of coverage-forfeiture conditions, but *within* the category of "notice" requirements, the law imposes "separate and distinct" requirements on every insured, e.g., "timely-notice-of-occurrence" and "timely-notice-of-claim."

Moreover, these are requirements for *each* occurrence and claim. *AMRO, supra*, 936 F.2d at 1429. Reflective of this distinction, the law holds that a failure to articulate and preserve a late-notice-of-*occurrence* defense also waives, as a matter of law, any late-notice-of-*claim* defense as to any claim arising from that occurrence for which late notice was waived. *See* note 11, *supra*. Given that these two defenses are separate as to *each* alleged occurrence and claim, the law also holds that an insurer who fails to plead the legal contention of *which* notice defenses are applicable to *which* occurrences and *which* claims also fails to provide the specificity required to preserve the defense. *Carter v. Mount Vernon Fire Ins. Co.*, 188 A.D.2d 430, 431, 591 N.Y.S.2d 1022 (1st Dep't 1992) (waiver of defense that insured gave *untimely* written notice where disclaimer merely referred to insured's failure to provide the requisite "written notice"). Further, where the specified defense fails to unambiguously implicate the relevant nucleus of facts, the disclaimer must specify each of the multiple fact-sets relied upon for the defense. *See, e.g., Aetna Cas. & Sur. Co.*, 251 A.D.2d at 220 (waiver for failure to itemize each of two alternative fact-sets giving rise to the enumerated defense of untimely-notice-of-occurrence).[13]

[13] The "specificity and particularity" required for affirmative defenses under CPLR § 3015 can be no less than that which is required under the substantive law establishing the specificity and particularity required of disclaimers generally. Indeed, under CPLR § 3015, the defendant must affirmatively plead (i) the legal contention that the relied-upon forfeiture condition "has not been fulfilled," *1199 Housing Corp. v. Int'l Fidelity Ins. Co.*, 14 A.D.3d 383, 384, 788 N.Y.S.2d 88

Accordingly, as a matter of law, OB's Answer, like the disclaiming correspondence that preceded it, fails to make a timely and specific disclosure of the known "untimely notice" defenses ultimately relied upon by the IAS court. This additional breach by OB is an independent basis for finding waiver of these concealed defenses.

C. EL's Notice Was Not "Untimely As A Matter Of Law"

1. Huntington

The IAS court relied on *American Insurance Co. v. Fairchild Indus., Inc.*, 56 F.3d 435, 438 (2d Cir. 1995), which holds that the trigger for noticing an occurrence is when the insured "bec[o]me[s] aware of an event that a reasonable person might believe would give rise to a liability covered by the policy." The other case cited by the IAS court, *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 24 A.D.3d 172, 173, 805 N.Y.S.2d 74, 75 (1st Dep't 2005), held that an insured violated the occurrence-notice requirement where it failed to notice an occurrence either before or reasonably after receiving "a letter from the [State] threatening a lawsuit." *Id.*

(1st Dep't 2005), and (ii) the "factual basis" for the legal contention that the condition has not been fulfilled. *Robbins v. Growney*, 229 A.D.2d 356, 645 N.Y.S.2d 791, 792 (1st Dep't 1996), *see Glenesk v. Guidance Realty Corp.*, 36 A.D.2d 852, 321 N.Y.S.2d 685, 687 (2d Dep't 1971) (answer insufficient for want of actual factual allegations from which it could be inferred that plaintiff "was aware of certain facts and, being aware of them, elected not to take advantage of them").

Neither of these cases support the IAS court's conclusion that an insured can infer that another "might bring suit" *only* if the putative claimant has signaled that a suit is a reasonable possibility via its "contact" with the insured. As a matter of simple logic, there is nothing about a public report made by a potential plaintiff (such as the State's 12/86 Report) or a communication from a third-party (such as the September 1987 report of EL's consultant) that would somehow prevent that report or communication from being an "event" indicating a reasonable possibility that one "might bring suit" against the insured for policy-period damage. OB itself knows better: it *told* EL in 1989 that OB regarded EL's 1987 "notice of potential claim" as notice of EL's "potential liability" to the State for remediation at Huntington notwithstanding the absence of any prior "contact" between EL and the State. Further, the insurer's objective of requiring notice of an occurrence was likewise achieved: in the face of EL's 1987 notice, OB "determined to investigate" the matter.

Bottom line, EL's 1987 notice that the State might bring suit relative to Huntington met the IAS court's requirement for timely notice of occurrence, inasmuch as that notice was issued and received "prior to 1999."

The IAS court was not clear as to whether it regarded EL's allegedly untimely notice that the "State might bring suit" as a violation of the "notice-of-*claim*" requirement as well as the "notice-of-occurrence" requirement. (*See* R.27-

28). The law is clear, however that the mere threat of a suit does not trigger the notice-of-claim requirement. While, colloquially speaking, a potential plaintiff may be said to "have" a claim whenever it threatens suit, the trigger for notice is that a claim actually has been "*made*" against the insured, which does not occur unless and until such suit-threatening entity actually issues, to the insured, "a demand for specific relief owed because of alleged wrongdoing [within the scope of coverage]." *In re Ambassador Group Litig.*, 830 F.Supp. 147, 155 (E.D.N.Y. 1993); *accord Turner v. State*, 13 Misc.3d 252, 256, 818 N.Y.S.2d 896, 899 (2006) (third-party's "notice of intention to file a claim is not a legal paper in connection with a claim or suit within the meaning of the insurance contract"); *Marvel*, 2004 WL 483212 at *6 (even a "strongly worded ... threat of litigation" against the insured, without more, "cannot constitute a demand" upon the insured).

The other decisions relied on by the IAS court are in accord. In *Long Island Lighting*, the court held that a communication "threatening a lawsuit over the [landfill] site" merely bespoke an "*occurrence*." In *American Ins. Co. v. Fairchild Indus.*, 56 F.3d 435, 440 (2d Cir. 1995), and *State of New York v. Ludlow's Sanitary Landfill, Inc.*, 50 F.Supp.2d 135, 138 (N.D.N.Y. 1999), a claim was deemed "made" because the State's communication to the insured demanded "remediation efforts" and/or reimbursement of "response costs."

2. Blydenburgh

The law is clear: the occurrence-noticing requirement does *not* require giving notice where the report of property damage made to the insured does not indicate the occurrence of property damage *within the policy period.*

In *Maryland Cas. Co. v. W.R. Grace,* 128 F.3d 794, 801 (2d Cir. 1997), the court *rejected* the same argument that the IAS court accepted below, i.e., that the insured must give notice "whenever [the insured] is aware of circumstances, happening *outside* the time period of the relevant policy, that create a reasonable possibility that an occurrence might happen *within* the policy period for which some claims might later be made." 128 F.3d at 801 (emphasis added). As support for this losing argument, the insurer in *W.R. Grace* relied on *Commercial Union Ins. Co.*, 822 F.2d 267 – the same case relied upon by the IAS court. However, *W.R. Grace* held that (i) the insurer's argument was legally fallacious and (ii) *Commercial Union* was distinguishable factually.

The actual rule of law is that where there has been no report of damage *within the policy period*, there is no requirement to report an "occurrence":

> On its face, the notice provision ... requires notice of an occurrence, without a limiting reference to the [insurance] policy. However, [the insured] is entitled to a common sense interpretation ... that limits it to occurrences during the term of the [insurance] policy. The notice provision requires notice of an "occurrence, claim or suit," and obviously the insurer is not requiring its insured to give notice of suits that do not implicate the insurer's policy. Notice of "suit" must mean

> notice of suit for recovery of damages for which its insurer might have to respond, and the same construction applies to notice of "occurrence."

W.R. Grace, 128 F.3d at 800; *accord Morris Park Contracting Corp. v. National Union Fire Ins. Co.*, 33 A.D.3d 763, 766, 822 N.Y.S.2d 616, 620 (2d Dep't 2006) (insurer's summary judgment motion denied because insureds' notice obligation not triggered until "it bec[a]me reasonably clear that the [policy's] coverage might be implicated").

The facts of *Commercial Union*, the *W.R. Grace* court pointed out, establish that this rule of law actually was *followed* in *Commercial Union*: "The occurrence [in *Commercial Union* was] the report of injuries occurring *within the time period of the applicable insurance policy*." 128 F.3d at 802 (emphasis added).

Application of the *correct* rule of law to the undisputed facts here dictate that there was no notice trigger in "1998." Although the State asserted the obvious proposition that any property damage that occurred did so during the Blydenburgh landfill's period of operation – which was identified as "1927 to 1990" – it is undisputed that the State never asserted that damage occurred *each and every year* within that period, much less that it believed that damage occurred as far back as the ELAC policy period of September 1968—September 1971. In fact, prior to 1999, public and direct communications from the State were to the contrary. The earliest hazardous disposal date cited in the State's (public) 1992 ROD was

"1978," and the report of damage referred only to damage that became manifest after 1978. The "PRP search" files of the State directly provided to EL in May 1998 established, as investigator Cotilla admitted at his deposition, that the State was not alleging (or even investigating) damage prior to "1973." To find against EL, the IAS court reversed itself on the issue of the significance of the State's "contact" with EL. Whereas the absence of such contact was adversely dispositive to EL as to the Huntington occurrence-notice trigger, the fact (and content) of this occurrence-precluding "contact" with the State suddenly and inexplicably became irrelevant to the IAS court when it came to deciding the Blydenburgh occurrence-notice trigger.

In any event, EL cannot be required to divine that the State is reasonably likely to bring suit in mid-1998 alleging ELAC policy-period damages when the State's investigator *himself* concluded, from his *own* pre-tolling interviews, that grounds were lacking at that time even to name EL as a "PRP." EL cannot be charged with greater knowledge of the State's disposition to suit in mid-1998 than the State itself admitted to and expressed to EL at that time.

EL also put forward (undisputed) evidence that EL met the legal requirement for "late" notice which, as articulated by the IAS court, is the subsistence of a good faith and reasonable belief by the insured in its non-liability for policy-period property damage. (R.28); *Morris Park Contracting Corp.*, 33 A.D.3d at 766

(evidence of insured's prompt good-faith investigation, which did not find factual grounds suggesting that a non-frivolous lawsuit could be filed, raised triable issue of fact).

As noted, immediately after being invited to execute the Blydenburgh tolling agreement, EL sought and obtained the pre-May 1998 witness interviews conducted by the State. That alone would have been enough to establish a good faith and reasonable belief by EL that it would not be held liable for property damage dating back to the ELAC policy period. But there is more: in September 1998, EL conducted its own investigation and obtained actual affidavits from witnesses. No witness testified to any hazardous disposals at Blydenburgh during the ELAC policy period.

Yet, in another inexplicable ruling, the IAS court held that EL could not hold the requisite belief in non-liability so long as EL disposed of some type of "waste" – even if only non-injurious waste – during the ELAC policy period. However, one cannot contribute to property damage via disposals of items that are entirely non-injurious. So, the IAS court's ruling effectively nullifies the "good faith and reasonable belief in non-liability" exception to the occurrence-notice trigger.[14]

[14] To the extent the IAS court concluded that the *threatening of a suit* for policy-period damage is the same thing as the *making of a claim* for policy-period damage, that would be erroneous for the reasons set forth in Point I.C.1, *supra*. Further, as a matter of simple logic, the absence of any reportable *occurrence* prior to 1999 at Blydenburgh precludes the possibility of any

II.

ESTEE LAUDER'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED

A. Constructive Waiver And Timely Notice Were Established As A Matter Of Law

For the reasons set forth in Point I of Appellant's Brief, the evidence upon which EL relies in demonstrating that the IAS court erroneously *granted* OB's motion also establishes that the IAS court erroneously *denied* EL's motion dismissing OB's so-called "untimely notice defense." In all material respects, the facts relied upon by EL are not subject to any genuine dispute.

B. OB Owed And Breached The Duty To Defend

The IAS court's error in failing to dismiss OB's untimely notice defense led the court into the additional error of mooting the prong of EL's motion seeking a declaration that OB breached its duty to defend the allegations against EL of liability for property damage occurring as far back as the ELAC policy period. However, because OB's "untimely notice defense" is legally deficient, the IAS court should have reached – and granted – EL's summary judgment on this issue.

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pre-1999 *claim* against EL. Thus, there is no evidence of any demand for payment or remedial action being made upon EL relative to Blydenburgh prior to 1999.

1. The ELAC Policy *Did* Issue To EL

In that Renewal Policy, OB represented to EL that the subsisting policy being renewed was indeed the ELAC policy, no. "E16-40036-27." (R.1356). The law holds that the admission by the insurer, in a renewal policy, that the missing policy is the policy being renewed *precludes* any genuine dispute that the missing policy "issued." Indeed, OB has helped create this law, having previously litigated and lost on this issue. *See Dart Industries, Inc. v. Commercial Union Ins. Co.,* 28 Cal. 4th 1059, 1073, 52 P.2d 79 (2002) (rejecting OB's argument that a missing policy "never issued" where evidence established that OB issued a renewal policy identifying the supposedly "never issued" policy as the renewal policy's predecessor); *accord Burroughs Wellcome Co. v. Commercial Union Ins. Co.,* 632 F.Supp. 1213, 1223 (S.D.N.Y. 1986) ("*Burroughs I*") (rejecting OB's attempt to contradict, in coverage litigation, admission made by OB that a policy containing a broad duty-to-defend clause was a "renewal" of the policy in dispute); *see also* authorities cited in Point II.B.2(a), *infra.*

2. The Policy Imposed A Duty-To-Defend Suits Alleging Property Damage During The September 18, 1968 – September 18, 1971 Period

The policy terms and condition material to EL's claim of breach of the duty to defend are those establishing (i) the existence and scope of the duty-to-defend, and (ii) the policy's subsistence period.

As more fully set forth below, EL came forward with sufficient secondary evidence to establish terms evincing that OB owed a defense of any suit alleging property damage during the period of September 18, 1968 and September 19, 1971.

(a) The Unrebutted "Duty-To-Defend" Evidence

It is indisputable that the ELAC policy was a "duty-to-defend" policy.

First, it is an undisputed fact that the Renewal Policy contained a duty-to-defend clause.[15]

Second, it is an indisputable rule of law that the same duty-to-defend provision that appears in a renewal policy presumptively appeared in the policy being renewed as well. *Burroughs I*, 632 F.Supp. at 1223 (finding that OB failed to rebut legal presumption that renewal policy's terms (except for time period) are

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[15] The Renewal Policy provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and *duty to defend* any suit against the insured seeking damages on account of such ... property damage, even if any of the allegations of the suit are groundless, false or fraudulent....

(R.204)(emphasis added). "Such" property damage is defined earlier in the clause as property damage "caused by an occurrence," *id.*, which is defined as "including":

> injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id. at Definitions (R.197).

identical to policy being renewed); *Century Indem. Co. v. Aero-Motive Co.*, 254 F.Supp.2d 670, 692 (W.D. Mich. 2003) (granting summary judgment to insured where OB failed to rebut the presumption of uniformity between missing policy and policy renewing it; the "rule [is] that unless an *agreement to the contrary* is shown, a renewal policy is presumed to be on the same terms, conditions, and amounts as provided in the original policy"); *see L. Lewitt & Co. v. Jewelers' Safety Fund Soc.*, 249 N.Y. 217, 222, 164 N.E. 29, 31 (1928) ("Clearly a policy which renews an old policy must renew the terms of that policy as they stood at the moment of its expiration. An agreement to *renew* a policy, implies that the terms of the existing policy are to be continued ... in the absence of evidence, that a change was intended" (emphasis in original)); *Walton v. Sterling Fire Ins. Co.*, 10 A.D.2d 54, 56-57, 197 N.Y.S.2d 277, 279 (4th Dep't 1960) ("the existing [predecessor] policy to be contained [in the renewal policy] in the absence of a contrary intention"). Here, the duty-to-defend clause in the Renewal Policy – which appears on Form "MLB 202" – promises to provide coverage of the defense of "any suit against the insured seeking damages on account of ... such property damage, even if any of the allegations of the suit are groundless, false or fraudulent...." (R.204).[16]

[16] EL also came forward with additional evidence that the ELAC Policy, as a matter of OB's own practice, would have been issued with the MLB 202 duty-to-defend insuring clause. (R.1328-

Third, OB failed, as a matter of law, to rebut the presumption of uniformity. Indeed, OB is *precluded* from offering evidence of agreed-to "variations" between the missing policy and the Renewal Policy. That is because OB made the tactical decision below to eschew its own contemporaneous evidentiary admission (in the Renewal Policy) that the ELAC policy *did* issue to EL and chose, instead, to stand on the (fallacious) position that the ELAC policy "never issued." OB stood on this position as a *judicial* admission. (R.334, "Admission No. 1"). Thus, OB cannot now "take back" its judicial admission and suddenly "declare" the "as-issued" terms of the same policy it judicially declared "never issued" and thus contained no "as-issued" terms at all. *See Vanriel v. A. Weissman Real Estate*, 283 A.D.2d 260, 725 N.Y.S.2d 514 (1st Dep't 2001) (affirming trial court's preclusion of evidence contradicting judicial admissions).

In addition, in the evidence that OB did proffer below – an opinion from its in-house "underwriting expert," Arthur Simmonds (R.1058-1065) – Mr. Simmonds simply opined that the duty-to-defend clause that appears in the Renewal Policy, "MLB 202", *would not necessarily have been contained* in the missing predecessor policy. (R.1063-1064, ¶17). However, as noted, the presumption of uniformity as between a renewal policy and its predecessor policy is rebutted only by factual

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1332, ¶¶20-29).

evidence that the alleged variations actually *were agreed upon* (or decreed by law) at or after the inception of the renewal policy. As OB admitted in disclosure, OB could not even say when it first used MLB 202 (R.161-162, ¶ 28; *see* R.1365). Thus, OB could not deny that MLB 202 was included in policies issued in September 1968 (such as the ELAC policy).

This is not the first time OB has attempted, unsuccessfully, to use Mr. Simmonds to skirt the burden of this presumption. In a case remarkably similar to this one, *Aero-Motive*, 254 F.Supp.2d at 692-693, OB was rebuffed by the Court for trotting out opinion testimony of Mr. Simmonds that is a substantive clone of the Simmonds opinion here, rather than presenting the requisite factual evidence of *agreed-upon* variations. In *Aero-Motive*, the issue before the Court was (as it is here) the scope of the duty to defend imposed by a missing predecessor policy that was referred to, by policy number, in the declarations page of the renewal policy. The policyholder urged that the renewal policy, a three-year special multi-peril ("SMP") policy, issued by OB in the second half of 1971 (also like the Renewal Policy here), established the terms of the missing policy because (i) the renewal policy (just like the Renewal Policy here) referred to the missing policy as the policy being renewed, and (ii) the opinion of Mr. Simmonds submitted by OB did not constitute evidence of "agreed-upon variations" between

the renewal policy and the missing predecessor policy. The *Aero-Motive* court agreed with the policyholder and granted its summary judgment motion.

Mr. Simmonds' opinion in *Aero-Motive*, as it is here, was that the missing policy's terms "would not necessarily" contain the same terms and conditions as the policy that renewed the missing policy. *Id.* at 692. The Court held that this opinion was "insufficient to rebut the presumption [of uniformity] because it is based on speculation and fails to establish any agreement between the parties" as to the postulated variation. *Id.*; *accord, Burroughs I,* 632 F.Supp at 1223 (OB's failure to adduce evidence of agreed-upon variations between missing "pre-revision" policy and renewal policy entitled policyholder to summary judgment on claim to recover defense costs incurred on claims under missing policy); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 642 F.Supp. 1020 (S.D.N.Y. 1986) ("*Burroughs II*") (same); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 713 F.Supp. 694, 698 (S.D.N.Y. 1989) ("*Burroughs III*") (same).

For the same reasons, OB's impermissible proffer would fail here even if it were properly before the court.[17]

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[17] Also in derogation of its judicial admission that it is without evidence of any of the terms of the ELAC policy, OB has insinuated that the ELAC policy may have become subject to a "pollution exclusion" at some point after the ELAC policy issued. (R.1062, ¶13). However, the duty to defend would exist so long as the policy did not contain the exclusion *at the time of issuance*, inasmuch as the potential liability of EL at both sites dates back to the time of issuance ("1968").

(b) The Term Of The ELAC Policy Was September 18, 1968 To September 18, 1971

Because the Renewal Policy is itself a three-year policy with a term beginning on "September 18, 1968", the unrebutted presumption of uniformity is alone enough to establish that the ELAC policy was (i) a three-year policy (ii) ending on September 18, 1971.

What is more, EL adduced certificates of insurance further corroborating, contemporaneously, the subsistence of the ELAC policy during this same three-year period. The 1969 certificate of insurance issued by OB attests that policy no. "E-16-40036-27" (the ELAC policy) was issued on "September 18, 1968" and had a three-year policy period ending on "September 18, 1971." (R.1355). The 1970 certificate of insurance (issued by OB on July 2, 1970), attests to the same set of facts. (R.1354).

Of course, courts routinely rely upon secondary evidence of policy period dates, such as certificates of insurance. *See Burroughs I,* 632 F.Supp. at 1223 (granting summary judicial declaration that duty to defend existed (and was breached) under lost policy where insured's secondary evidence included certificates of insurance establishing existence of liability coverage during relevant period); *New York v. Blank*, 820 F.Supp. 697, 703 (N.D.N.Y.), *rev'd on other grounds*, 27 F.3d 783 (2d Cir. 1994) (applying New York law, granting summary

judicial declaration that duty to defend existed (and was breached) under missing policy based on insured's secondary evidence establishing dates of coverage, type of coverage and the named insureds); *Burt Rigid Box, Inc.*, 302 F.3d at 91 (insured was "entitled to summary judgment on the issue of the existence and terms of the [missing] policies" where insured's secondary documentary evidence established dates of coverage, type of coverage and the named insureds); *Aero-Motive*, 254 F.Supp.2d at 693 (granting summary judgment to a OneBeacon insured "with regard to the existence and material terms of coverage of [missing] policies" where insured's secondary evidence included declarations page of renewal policy indicating that the policy being renewed was the lost policy); *Coltec Indus., Inc. v. Zurich Ins. Co.*, No. 99 C 1087, 2002 WL 31185789, at **11,15 (N.D.Ill. Sept. 30, 2002) (summary judgment granted to insured "on the [missing] policies' existence, terms and conditions" based on certificates of insurance and specimen liability forms); *accord Dart Industries, Inc.*, 28 Cal. 4th at 1059 (where policy has been lost, the only provisions of the policy which must be proved are those "essential to the claim for relief"; "secondary evidence that attests to the substance but not the precise language" of such essential provisions is sufficient to meet burden of proof).

Moreover, each certificate bears a signature under the title "duly authorized agent of the Company," which is defined in the certificates' letterhead as

"Employers' Liability Assurance Corporation Ltd.," i.e., ELAC. (R.1354-1355). Thus, the certificates are further documentary *admissions* by OB that the ELAC policy issued and was in force during the period September 18, 1968 – September 18, 1971.

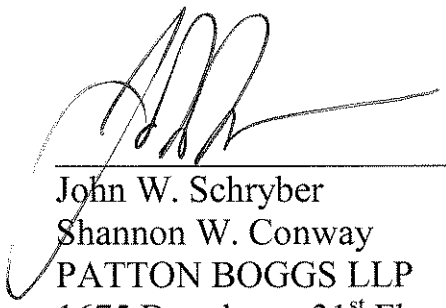
In sum, OB owed a duty to defend precisely what OB alleges was asserted here: proceedings alleging property damage dating as far back as the commencement of the policy period – September 1968. And, OB does not dispute that, to the extent it owed a duty to defend in 2002, it breached that duty by its failure to provide a defense at that (or any later) time pursuant to its 2002 disclaimer correspondence.

CONCLUSION

Based on the foregoing, the IAS court erred in granting summary judgment to Defendants-Respondents and in denying partial summary judgment to Plaintiff-Appellant. The IAS court's order should be reversed with direction to enter the order granting partial summary judgment that Plaintiff-Appellant moved for below.

Dated: New York, New York
September 28, 2007

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

ESTEE LAUDER INC.

INDEX NO. 602379/2005

MOTION DATE 9/6/2012

- v -

MOTION SEQ. NO. 008

ONEBEACON INSUR. GROUP, et al

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

FEB 29 2012

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 008 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion to amend is granted to the extent that the amended complaint in the form annexed to the moving papers, but omitting the proposed fourth cause of action, shall be deemed to have been served upon service by movant of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that the note of issue filed on May 6, 2011, is vacated, and the new deadline for filing a note of issue is December 17, 2012; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 438, 60 Centre Street, on April 10, 2012, at 10:00 a.m.; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant and upon the Trial Support Office (Room 158).

Dated: 2/23/2012

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

ESTEE LAUDER INC.,

Plaintiff,

-against-

Index No. 602379/05

ONEBEACON INSURANCE GROUP, LLC (successor in-interest to CGU INSURANCE, f/k/a EMPLOYERS GROUP OF INSURANCE COMPANIES, EMPLOYERS COMMERCIAL UNION INSURANCE CO. OF AMERICA and COMMERCIAL UNION INSURANCE COMPANY), ONEBEACON INSURANCE COMPANY and ONEBEACON AMERICA INSURANCE COMPANY,

Defendants.

----------X

CAROL R. EDMEAD, J.S.C.:

Plaintiff Estee Lauder Inc. (Lauder) moves, pursuant to CPLR 3025 (b) and (c), for leave to file a third amended complaint, so as to add a fourth and fifth cause of action alleging, respectively, bad faith coverage denial pertaining to duty to defend and bad faith coverage denial pertaining to paying undisputed defense costs. The damages that Lauder seeks in these proposed claims are the legal expenses that it has incurred in litigating this action. The facts underlying this action are set forth in *Estee Lauder, Inc. v OneBeacon Ins. Group, LLC*, 2006 WL 5110780, 2006 NY Misc LEXIS 4140 (Sup Ct, NY County 2006), *revd* 62 AD3d 33 (1st Dept 2009). In brief, Lauder sought coverage for three administrative and court proceedings in which it was alleged to have discharged, or to have caused to be discharged, toxic wastes in certain landfills located in Long Island.

As an initial matter, a motion to conform a pleading to the evidence, pursuant to CPLR 3025 (c), is appropriately made after

evidence has been introduced at trial. *See e.g. Ainetchi v 500 West End LLC*, 51 AD3d 513 (1st Dept 2008); *Equitable Life Assur. Socy. of U.S. v Nico Constr. Co.*, 245 AD2d 194 (1st Dept 1997). Here, of course, trial has not commenced, and no evidence has been introduced.

Absent prejudice to the movant's adversary, leave to amend a pleading, pursuant to CPLR 3025 (b), should be freely given. However, leave should be denied where the proposed amendment is "palpably insufficient as a matter of law." *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d 652, 652 (1st Dept 2010), citing *Thompson v Cooper*, 24 AD3d 203, 205 (1st Dept 2005).

Prejudice occurs where, because the substance of the proposed amendment was not included in the initial pleading, "the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-655 (1st Dept 2009), quoting *Loomis v Civetta Corinno Constr. Co.*, 54 NY2d 18, 23 (1981); *see also Valdes v Marbrose Realty*, 289 AD2d 28 (1st Dept 2001). Here, while OneBeacon argues that granting the motion will require striking the note of issue that plaintiff filed on May 6, 2011, and open the door to the making of a dispositive motion by Lauder, neither the possible making of such a motion, nor any further discovery that may take place, will hinder OneBeacon in presenting its defense.

As a general rule, an insurer's failure to perform its obligations under a policy that it has issued does not give rise to

a cause of action in tort. *Continental Cas. Co. v Nationwide Indem. Co.*, 16 AD3d 353 (1st Dept 2005); *Royal Indem. Co. v Salomon Smith Barney*, 308 AD2d 349 (1st Dept 2003). However, a claim for extra-contractual liability for legal expenses may be asserted where the insurer's denial of coverage shows "such bad faith ... that no reasonable carrier would, under the given facts, be expected to assert it." *Sukup v State of New York*, 19 NY2d 519, 522 (1967). "Proof of an insurer's bad faith `requires an extraordinary showing of disingenuous or dishonest failure to carry out a contract' (*Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 437 [1972]). ... These requirements cannot possibly be met where the insurance carrier has an arguable case for denying coverage." *Dawn Frosted Meats v Insurance Co. of N. Am.*, 99 AD2d 448, 448 (1st Dept), *affd* 62 NY2d 895 (1984), citing *Sukup*, 19 NY2d at 522.

OneBeacon's immediate predecessor-in-interest, Randall America, Inc. (Randall), disclaimed coverage with regard to two actions for which Lauder sought coverage, by letter dated July 24, 2002, stating that the company could not "locate any further evidence of the terms and conditions" of the pre-1971 policy, which Lauder claimed that it had been issued by Randall's predecessor-in-interest, CGU Insurance (Commercial Union). Kotula Affirm., Exh. EE.[1] By letter dated November 1, 2002, OneBeacon noted that the commercial general liability policy that Commercial Union had issued to Lauder, that was in effect beginning in 1971, contained

[1] This document, which was filed under seal, was not provided to the court with the papers on this motion. It was subsequently provided at the court's request.

a pollution exclusion that precluded coverage for environmental contamination claims. With regard to Lauder's tender of defense on the basis of a Commercial Union policy, allegedly in effect as of September 18, 1968, OneBeacon noted that, other than a certificate of insurance provided by Lauder, OneBeacon had been "unable to find any ... evidence to confirm the existence and terms of this alleged policy," and that, accordingly, OneBeacon was disclaiming coverage. Higgins Affirm., Exh. 14, at 1.

Lauder's proposed fourth cause of action alleges that all three disclaimers were made in bad faith, inasmuch as OneBeacon and Randall had in their possession, at the time of the disclaimers, the 1971 policy, which by its terms was a renewal policy, and thus, constituted incontrovertible proof of the one-time existence of the alleged 1968 policy. Neither Randall, nor OneBeacon, could, in good faith, positively assert that, assuming that Commercial Union had issued a 1968 policy, that policy, like the 1971 policy, contained a pollution exclusion. However, in view of the presumption that the terms of a renewal policy are the same as the terms of the policy that it renewed (*see Estee Lauder, Inc.*, 62 AD3d at 39-40), and therefore, the presumption that any 1968 policy would have contained a pollution exclusion, Randall's and OneBeacon's disclaimers on the grounds that they could not ascertain the terms of the allegedly lost policy is not evidence of bad faith on their part.

To be sure, the Appellate Division held that, notwithstanding the presumption of continuity of policy terms, OneBeacon had the

burden of proving, which it failed to do, that the lost policy "contained a pollution exclusion *during the entire policy period.*" *Id.* at 41 (emphasis added). That Randall and OneBeacon failed to anticipate that holding is not evidence of bad faith, let alone constituting an "extraordinary showing of disingenuous or dishonest failure to carry out a contract." *Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d at 437.

Lauder points out that, in the course of discovery in this action, OneBeacon expressly stated that the lost policy had never existed. That denial is irrelevant to the issue of whether OneBeacon and Randall acted in bad faith, at the time that they disclaimed coverage for the reasons that they then gave.

Lauder's proposed fifth cause of action alleges that OneBeacon's failure to pay any part of Lauder's defense costs in the three actions, despite the Appellate Division's grant of Lauder's motion for summary judgment that it was entitled to be paid its defense costs in two of the actions, and OneBeacon's acknowledgment that it was obligated to pay the costs of defending the third action, as well, is evidence of bad faith, as well as constituting a breach of the implied covenant of good faith and fair dealing in the lost 1969 policy. Generally, a tort claim that is redundant to a breach of contract claim cannot stand. Here, however, the proposed fifth cause of action seeks damages that are entirely different from the damages that the three breach of contract claims seek. *Compare Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107 (1st Dept 2005) (claim based on same

occurrences and seeking damages identical to those sought in quasi-contractual claim are redundant thereto). Accordingly, the court will consider the fifth cause of action on its merits.

The decision of the Appellate Division in this case stated that Lauder was entitled to a declaration that its defense costs in two of the three actions "must be paid promptly by OneBeacon to the extent that they are reasonable and necessary." *Estee Lauder, Inc.*, 62 AD3d at 40 n 6. OneBeacon argues that it is entitled to question whether a significant portion of Lauder's defense costs were paid for the defense of an uninsured related company, and to raise arguments as to the reasonableness of Lauder's claimed defense costs. It is undisputed that, no later than June 2010, Lauder provided OneBeacon with unredacted invoices evidencing Lauder's legal expenses. While OneBeacon may have defenses to Lauder's proposed fifth cause of action, OneBeacon's failure to pay any of Lauder's defense costs, to date, viewed in the context of the Appellate Division's order that reasonable and necessary costs be paid "promptly," shows that Lauder's proposed fifth cause of action is not "palpably insufficient as a matter of law." *Aerolineas Galapagos, S.A. v Sundowner Alexandria, LLC*, 74 AD3d at 652.

Accordingly, it is hereby

ORDERED that the motion to amend is granted to the extent that the amended complaint in the form annexed to the moving papers, but omitting the proposed fourth cause of action, shall be deemed to have been served upon service by movant of a copy of this order

with notice of entry; and it is further

ORDERED that defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of said service; and it is further

ORDERED that the note of issue filed on May 6, 2011, is vacated, and the new deadline for filing a note of issue is December 17, 2012; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 438, 60 Centre Street, on April 10, 2012, at 10:00 a.m.; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendant and upon the Trial Support Office (Room 158).

Dated: February 23, 2012

ENTER:

J.S.C.

HON. CAROL EDMEAD